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No. 90-20

In The

Supreme Court of the United States

October Term, 1990

STATE OF HAWAII,

Petitioner,

v.

JOHN KALANI LINCOLN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Hawaii

PETITIONER'S REPLY MEMORANDUM

WARREN PRICE, III*
Attorney General
State of Hawaii
**Counsel of Record*

JOHN C. BRYANT
STEVEN S. MICHAELS
Deputy Attorneys General
State of Hawaii

Room 214, Hale Auhau
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365

Counsel for Petitioner

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PETITIONER'S REPLY MEMORANDUM

I. SUMMARY OF ARGUMENT.

Respondent John Kalani Lincoln's Brief in Opposition demonstrates clearly why this Court has jurisdiction to overturn the Supreme Court of Hawaii's judgment reversing, on Confrontation Clause grounds, Lincoln's conviction for murder, and, in addition, why that judgment sharply departs from this Court's jurisprudence, and, in turn, merits review and reversal.

In addition, as the judgment below conflicts with *Idaho v. Wright*, No. 89-260 (U.S. June 27, 1990), the Court may wish to grant the petition, vacate the judgment, and

remand for further consideration in light of the decision in *Idaho v. Wright*.

In any event, the petition should be granted to correct the Supreme Court of Hawaii's clear departure from the settled rule that the Confrontation Clause is not violated by admission of "cross-examined prior-trial testimony," which has been repeatedly held to fall within a "firmly rooted hearsay exception." *Ohio v. Roberts*, 448 U.S. 45, 66 & n.8 (1980).

II. ARGUMENT.

A. The Judgment Does Not Rest Upon an Independent and Adequate State Ground.

Respondent's argument that "[t]he judgment of the Hawaii Supreme Court is based upon independent and sufficient state grounds" (Resp. Br. 9) simply ignores the now-settled requirement, dictated by *Michigan v. Long*, 463 U.S. 1032 (1983) (per curiam), and a host of decisions since, that this Court will assume jurisdiction over final judgments arising from the state courts in the absence of "a 'plain statement' of the [state] court's reliance on an alternative state-law holding." *Quinn v. Millsap*, 109 S. Ct. 2324, 2329 n.6 (1989). Indeed, *Long* is not even cited, let alone discussed, in the opposition brief.

Respondent simply has no good answer to the fact that, as in *Long* itself, the Supreme Court of Hawaii's references to state law, in the course of holding that the admission of Anthony Kekona Jr.'s past cross-examined testimony "violate[d] Lincoln's constitutional right to confront his accuser" (Pet. App. 9a), were "interwoven

with" "federal law" and failed to indicate the state court's understanding that its result was not in any way "compelled by" federal law. *See Long*, 463 U.S. at 1040. Indeed, Respondent aptly notes that the Supreme Court of Hawaii's analysis was grounded fundamentally in the state court's "[r]eliance upon *Chambers v. Mississippi*, [410 U.S. 284 (1973)] and *Ohio v. Roberts, supra*" (Resp. Br. at 11).

Lincoln's claim that this Court's authority is ousted because the Supreme Court of Hawaii also relied upon "its own decisions" does not satisfy *Long's* plain statement requirement, and in fact is contrary to 175 years of precedent authorizing the correction of state court error in this Court. *See, e.g., Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

As has been repeatedly held, state courts fully share authority to enforce federal law. *See, e.g., Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988); *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525 (1986); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240 n.2 (1985); *Illinois v. Gates*, 462 U.S. 213, 221-22 (1983); *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982); *Allen v. McCurry*, 449 U.S. 90, 105 (1980).

With that authority comes reviewability in this Court of constructions of federal law that underlie a final judgment, as exists in the case here, which is not accompanied by a "plain statement" of reliance on state law grounds. As stated in our Petition, nothing in the Supreme Court of Hawaii's "own decisions" which were cited in support of the judgment below (*State v. Kim*, 55 Haw. 346, 519 P.2d 1241 (1974), and *State v. Faafiti*, 54 Haw. 637, 513 P.2d 697

(1973); *see also State v. White*, 65 Haw. 286, 651 P.2d 470 (1982)), in any way indicate that the Hawaii confrontation clause (Haw. Const. art. I, § 14 (1978)) is viewed as broader than its federal counterpart, and, at the least, the judgment below signifies that the Hawaii Constitution "is construed in pari materia with the [Sixth] Amendment." *Maryland v. Garrison*, 480 U.S. 79, 83-84 (1987).

Respondent simply has no answer to this, and the independent and adequate state ground doctrine is no bar.[1]

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[1] Respondent makes no argument (and thus should be deemed to have waived (*see* Rule 15.1) any claim) that the grounds for reversal were not "pressed or passed upon" below, *see Illinois v. Gates*, 462 U.S. 213, 218-22 (1983), and it is clear that the judgment below is final. *See* Pet. at 2 (citing *New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984). Indeed, the necessity for review has become even more salient since the petition (and even the brief in opposition) were filed, insofar as the absent witness here, Anthony Kekona, Jr., has recently stated an intention to refuse to cooperate unless the State provides an array of benefits, including an early release date, which the Attorney General of Hawaii quite properly believes at this time, if granted, would lead to a miscarriage of justice. In light of this development, the state trial court to which the case has been remanded has suggested it will dismiss the indictment. A transcript of the state court's oral remarks at the hearing on Respondent's recent motion to dismiss is attached and called to the Court's attention pursuant to Rule 15.7. Also attached pursuant to Rule 15.7 is Petitioner's Motion for Further Hearing on Defendant's Renewed Motion for Judgment of Acquittal and/or Dismissal of Amended Indictment, No. 90-1022 (Haw. Cir. filed Sept. 11, 1990). Without in any way conceding the propriety of any dismissal order under the mandate of the Supreme Court of Hawaii, or otherwise, or diminishing the State's efforts to satisfy the state courts, Petitioner submits

(Continued on following page)

B. Review Should be Granted to Correct the Supreme Court of Hawaii's Expansive Reading of the Reliability Component of this Court's Confrontation Clause Jurisprudence.

Respondent offers no good ground for denying review of our central claim that the Supreme Court of Hawaii's reversal of Respondent's conviction fundamentally misapplied this Court's settled precedents construing the Confrontation Clause. *See* Pet. at 11-15. Indeed, as this Court's analysis in *Idaho v. Wright*, No. 89-260 (U.S. June 27, 1990), virtually dictates reversal of the judgment of the Supreme Court of Hawaii, the grounds for granting a writ of certiorari are plain.[2]

As our Petition makes clear, the reversal of Respondent's conviction on the ground that "the prior cross-examination of Kekona" was "rendered inadequate by subsequent events" (including Kekona's own recalcitrance at Respondent's second trial) wrongly "imposes the burden of 'undertak[ing] a particularized search for "indicia of reliability" ' in precisely those cases in which such searches have been ruled unnecessary." Pet. at 13 (quoting *Roberts*, 448 U.S. at 66, 72). As *Idaho v. Wright*, 110 S. Ct. 3139 (1990) shows, the Supreme Court of

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(Continued from previous page)

that, despite Respondent's efforts to narrow the import of the judgment below (*see* Resp. Br. at 9), these new facts underscore the finality of the judgment below and considerations warranting certiorari.

[2] *Idaho v. Wright* was decided on the day the petition for certiorari in this case was filed, and, therefore, was not cited in the Petition. However, the grounds for reversal to which *Wright* pertains were fully raised in the petition.

Hawaii's inquiry into the "reliability" of Kekona's past cross-examined trial testimony based upon "subsequent events" is simply wrong.

As *Wright* reiterates, under this Court's "general approach" to confrontation problems, "once a witness is shown to be unavailable," his out-of-court statements may be introduced where the statement bears " 'adequate "indicia of reliability," ' " and such reliability " 'can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.' " 110 S. Ct. at 3146. In clarifying this "safe harbor" for evidence within such "firmly rooted" exceptions, the Court reasoned that "[a]dmission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." *Id.* at 3147.

Wright thus makes clear the distinction in analysis for admission under the exception for past cross-examined trial testimony (which applied to both Kekona's 1980 trial testimony (*see* Pet. App. 15a) and his 1984 testimony retracting his 1982 retraction (*see* Pet. App. 18a)), and admission under a "residual hearsay exception," which, "by contrast, accommodates *ad hoc* instances in which statements not otherwise falling within a recognized hearsay exception might nevertheless be sufficiently reliable to be admissible.' " *Id.* As *Wright* makes clear, it is only the latter category of hearsay statements that must be supported by " 'a showing of particularized guarantees of trustworthiness.' " *Id.* at 3148. In analyzing why the "firmly rooted hearsay exceptions" receive this distinct favorable treatment, the Court emphasized that

" '[t]he circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not include those that may be added by using hindsight.' " *Id.* at 3149 (citation omitted).

The judgment of the Supreme Court of Hawaii cannot be squared with this logic, or the decisions in which it rests, and must be reversed. While never contesting that Kekona's past cross-examined trial testimony fell within a "firmly rooted" hearsay exception, the Supreme Court of Hawaii ignored the "the weight accorded longstanding judicial and legislative experience" with the exception for such testimony, and, what is more, sought to review the wisdom of applying that exception through the lens of hindsight, as focused by Kekona's feigned retraction of his 1980 trial testimony. Such an approach, under *Wright*, is erroneous even if the exception for past cross-examined trial testimony were *not* "firmly rooted," which, of course, is plainly not the case, as nearly a century of precedent indicates. *See, e.g., Mattox v. United States*, 156 U.S. 237 (1895). As *Wright* makes clear, the "indicia of reliability" component of this Court's alternative basis for gaining admission of otherwise admissible hearsay must turn on "whether the . . . declarant was particularly likely to be telling the truth when the statement was made," *Wright*, 110 S. Ct. at 3150. Evidence that subsequent events give rise to grounds for impeachment is simply not relevant to this inquiry, and, a fortiori is irrelevant when, as *is* the case here, the proffered testimony does fall in a "firmly rooted" hearsay exception. *See also* id. at 3150-51.

Respondent's tautological claim that the Supreme Court of Hawaii properly rejected Kekona's former trial testimony as "patently untrustworthy evidence which had been admitted by the trial court without any consideration for its reliability" (Resp. Br. 11) simply overlooks "the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." *Wright*, 110 S. Ct. at 3147. Indeed, Respondent's conclusory arguments that the 1980 Kekona prior trial testimony is "patently untrustworthy" (Resp. Br. 11), confirms that, under the rule adopted by the Supreme Court of Hawaii in this case, in any situation where a witness becomes recalcitrant at trial, past cross-examined testimony, no matter how scrupulously cross-examined, would be constitutionally inadmissible. As the Petition shows, this is not, nor can it be, the law.[3]

The short answer to Respondent's arguments is that the balance struck by the Confrontation Clause, *see Bourjaily v. United States*, 483 U.S. 171, 182 (1987), in this case, and in the enormous number of cases like it, is not

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[3] In fact, as the Petition stresses, the Supreme Court of Hawaii's refusal to accord any weight to Kekona's obvious motive temporarily to retract his 1980 trial testimony in 1982 in order "to receive a free trip back to Hawaii from his mainland prison" (Pet. at 13 (quoting Pet. App. 8a)), and therefore the plain conclusion that the 1982 retraction was in fact false, is error under *Wright* even if all the above is wrong, for underlying motives, at the time the out-of-court statement is made, are at least one of the factors to be weighed where, as is not the case here, the proffered testimony falls without a "firmly rooted" hearsay exception. 110 S. Ct. at 3150 (citing cases).

vindicated by the exclusion of past cross-examined testimony, but by the admission of the evidence that purportedly impeaches that testimony. *See* Pet. at 13-14. Here, these protective measures were fully implemented, and the jury reached a discriminating verdict convicting Respondent as an accomplice in the brutal murder of Paul Warford. The issue is weight, not admissibility, and, as to weight, Lincoln had his day in court before the triers of fact. The Hawaii Supreme Court erred in requiring Lincoln's retrial.

As the far-reaching judgment of the Supreme Court of Hawaii has no support in law, or logic, the petition should be granted.

III. CONCLUSION

For the reasons above and in the Petition, the Court should grant the petition and summarily reverse the judgment of the Supreme Court of Hawaii, or set the case down for argument.

Because the Supreme Court of Hawaii did not have the benefit of *Idaho v. Wright*, No. 89-260 (U.S. June 27, 1990), the Court may wish to grant the petition, vacate the judgment, and remand for further consideration in light of *Idaho v. Wright*, No. 89-260 (U.S. June 27, 1990). In any event, the Court should grant the State of Hawaii's petition for writ of certiorari.

Respectfully submitted, September 13, 1990.

WARREN PRICE, III*
Attorney General
State of Hawaii
**Counsel of Record*

JOHN C. BRYANT
STEVEN S. MICHAELS
Deputy Attorneys General
State of Hawaii

Room 214, Hale Auhau
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365

Counsel for Petitioner

APPENDIX "H"

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT STATE OF HAWAII

STATE OF HAWAII, vs. JOHN KALANI LINCOLN, Defendant.	CR. No. 90-1022

TRANSCRIPT OF PROCEEDINGS

Had before the HONORABLE MARIE N. MILKS, Judge, presiding Sixteenth Division, on Friday, September 7, 1990, in the above-entitled matter.

APPEARANCES:

JOHN BRYANT Deputy Attorney General State of Hawaii	For the State
ERIC A. SEITZ, ESQ.	For the Defendant

REPORTED BY:

Gwendolyn K. Correa, RPR, CSR 118
Official Court Reporter
State of Hawaii

FRIDAY, SEPTEMBER 7, 1990

(The case was called.)

(Appearances were noted.)

THE COURT: The record will note, Mr. Seitz, that I did receive from you the transcript of the proceedings before Judge McConnell on May 2nd consisting of seven

typed pages. And the Court will point out to you again, Mr. Bryant, that my impression of the documents was correct that Judge McConnell did indicate that he would grant the motion if he did not have an affidavit indicating that Mr. Kekona would be available and would testify in court. So that is confirmed by Judge McConnell's finding.

And the record will note that I've gotten through Volume 25 of the transcripts of the prior trial and I'm – there's still about ten more volumes to go through. So there's quite alot more reading for me to do. Do you wish any further argument?

MR. SEITZ: No.

MR. BRYANT: I have read the transcript of Judge McConnell's comments; and as noted in the transcript, I disagreed strenuously with his contention that without Kekona's testimony, we did not have enough to go forward. I still to this day believe that; and I respectfully submit, Your Honor, that it would be an abuse of discretion to grant this motion based upon the evidence that we could present at trial.

And, secondly, it's pure speculation at this point whether or not Anthony Kekona will or will not testify, especially in light of the sanctions that this Court can apply to him should he refuse a court order.

A big difference between this case and Moriwaki is the fact that in this case, two juries, Your Honor, have convicted the Defendant of the offense of murder. In Moriwaki, you had hung juries in that particular case. That is a significant difference, and I submit that this case is simply too serious and the crime too heinous for this

Court to dismiss based upon the grounds that the Defendant proferred.

I think the better alternative would be to wait and see what comes out in the State's case in chief. At that point in time, the Court has the authority and can exercise its discretion; and if so chooses, can dismiss or acquit at that particular point.

One final thing. If this Court is inclined to grant the Defendant's motion, the State is requesting that the decision and order be made after the United States Supreme Court rules on our petition for certiorari in which we've essentially asked the supreme court to review the State of Hawaii's decision reversing Lincoln's conviction.

We have spoken to the clerk's office at the United States Supreme Court. It is our understanding that this petition will be decided on later this month at their first conference, September 24th, and the order to issue the first Monday in October, which I believe is October 1st. That would cause the defense no prejudice. It will help to clarify the record.

If the Court grants this motion, obviously, trial will not go forward. If the United States Supreme Court elects to hear our petition, obviously, I don't think trial can go forward; and, therefore, we're making that request should this Court be inclined to grant the motion.

THE COURT: May I have a response, Mr. Seitz.

MR. SEITZ: Yes, I think the motion should be granted today. I think, frankly, it's quite clear to us that if we have to wait until October 1st, we're going to have to do enormous amount of work and go to great expense to

prepare for a murder case which will start trial on October 15th as it's presently scheduled.

At this point, Mr. Lincoln has been incarcerated for 11 years, and I think it's somewhat cavalier to say we should wait even a day longer when the only witness who's able and has ever identified him as a participant in these is now saying he's not going to testify. We've been through this so many times with Kekona. I think it borders on bad faith for Mr. Bryant to say again we should wait for Kekona, and Kekona should be determinative of how these proceedings should go.

I think Judge McConnell made it very clear that if the State could not assure that they would have Kekona's testimony, he intended to dismiss the case when we went back to him May 29th. They got an affidavit but they don't now, and I would request that based upon what is clearly stated in the record by Judge McConnell, based upon his appraisal of the record, his familiarity with the proceedings, and the affidavit, and his clear and unequivocal intention to dismiss the case, that the case should be dismissed and should not go forward; and Mr. Lincoln should not be able to be incarcerated.

THE COURT: I can make preliminary findings for counsel. I think it's important for you to understand why I said I had to finish reading the transcripts. Under State v. Moriwaki, the supreme court says that the trial court has to come to its own evaluation of relative case strength. And while I appreciate the supreme court's statement that without Kekona's testimony, the case is

flimsy, and while I respect and appreciate Judge McConnell's statement that he would grant the motion for dismissal, the law requires this Court to make its own evaluation.

And so even at this point, what I've read so far would lead me to grant the motion; and I'll state my reasons why. I think it's incumbent on me to complete a reading of the record. I think for me to rule without having viewed the entirety of the record would not be appropriate or proper. But based on what I've heard thus far and based on what I've read so far, subject to something happening between Volume 25 and the end of the second binder, the Court would be inclined to grant the motion to dismiss.

Now, let me tell you that, in addition to completing my reading of the transcript, State v. Moriwaki refers to the case of State v. Lundine, which is an Iowa Appellate Court decision. And in that case, twelve relevant considerations are listed. In Moriwaki there are six. I'd like to read the Lundine decision to see whether or not there may be other factors that can also apply to this case.

Let me tell you that I see a significant difference between the Moriwaki case and this case, and I feel that the facts under this case are worse than in the Moriwaki case. And the reason is in Moriwaki, there were two trials based on competent evidence, and the jurors in the cases could not honestly agree to the verdict.

In our situation, the supreme court has found that Kekona's testimony should not have been used and so the strength of this case, if it were to proceed to trial without Kekona's testimony, is weakened for the reason that, as I

read in Volume 22, the testimony of Genevieve Langford, her testimony to co-conspirators' statements were based on statements made in furtherance of the conspiracy. But that would require the establishment of the conspiracy, and we would need Kekona's testimony to establish it. So unlike the Moriwaki situation, if this case were to go to trial again and Kekona's testimony were not used, this Court would strike certain other witnesses; and the evidence would be weaker and more flimsy than what the supreme court had said.

I'd also like to point out that Kekona's credibility was questioned by the Hawaii Supreme Court; and subsequent to Judge McConnell's hearing, there were affidavits required or a deposition required of Mr. Kekona. Judge McConnell, as I read his transcript, required some affirmative steps to be taken by the prosecutor. Moriwaki talks about taking into account the professional conduct and diligence of respective counsel, particularly that of the prosecuting attorney. There's an affirmative duty that Judge McConnell placed upon the prosecutor. There was a choice between a deposition and an affidavit. The affidavit was the route taken, and the Court finds that there should have been other steps taken that were not taken.

Kekona's own testimony at the trial regarding his credibility, the affidavit which he has submitted, and the subsequent correspondence, make his testimony even more questionable.

The Court would also like to point out that with regard to the nature of the prosecutor's conduct, that is number six on the Moriwaki considerations.

And last but not least, the State has taken the position that this Court should wait and see whether or not Kekona testifies in court. That is not the affirmative kind of step that this Court feels that is required of a prosecution of a case.

And so based on everything I've seen thus far, I can assure counsel that this Court will not wait for the United States Supreme Court to decide because the motion before the Court is to take the case in the state it's in in the state's system. And in the event the supreme court disagrees with the Hawaii state court and chooses to reverse the Hawaii state court, the conviction would stand; and that would be up to the United States Supreme Court. But this Court will rule according to what the Court has before it, and I will hope to rule within the week. I will notify counsel. I've been trying to read the transcripts as quickly as I can, but I've had other matters to take care of. But the Court will make specific, and hopefully more articulate, findings regarding the Moriwaki requirements.

But at this time my indication to counsel is that I will more likely than not grant the motion to dismiss based on what I've seen. All right. Counsel will be notified.

(Proceedings concluded.)

STATE OF HAWAII)
)
CITY AND COUNTY OF)
HONOLULU)

I, GWENDOLYN K. CORREA, an Official Court Reporter for the First Circuit Court, State of Hawaii, do

hereby certify that the foregoing pages comprise a true and correct transcription of my stenographic notes taken in the above-entitled cause, to the best of my ability.

Dated this 11th day of September, 1990.

/s/ Gwendolyn K. Correa
GWENDOLYN K. CORREA,
RPR, CSR 118
Official Court Reporter

APPENDIX "I"

2375K
WARREN PRICE, III 1212
Attorney General
State of Hawaii

JOHN C. BRYANT, JR. 3370
Deputy Attorney General
State of Hawaii
425 Queen Street, Third Floor
Honolulu, Hawaii 96813
Telephone: (808) 548-5336

Attorneys for the State of Hawaii

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII vs. JOHN KALANI LINCOLN, Defendant.	) CR. NO. 90-1022) STATE'S MOTION FOR FURTHER HEARING ON DEFENDANT'S RENEWED MOTION FOR JUDGMENT OF ACQUITTAL AND/OR DISMISSAL OF AMENDED INDICTMENT; AFFIDAVIT OF JOHN C. BRYANT, JR.; EXHIBIT "A"; STATEMENT OF PROPOSED WITNESSES AND EXHIBITS; NOTICE OF HEARING OF STATE'S MOTION FOR FURTHER HEARING ON DEFENDANT'S RENEWED MOTION FOR JUDGMENT OF ACQUITTAL AND/OR DISMISSAL OF AMENDED INDICTMENT AND CERTIFICATE OF SERVICE)) APPROXIMATE TIME: 2 hours) Hearing Date: 09/14/90) Hearing Time: 1:00 p.m. Judge: Marie N. Milks

STATE' MOTION FOR FURTHER HEARING ON DEFENDANT'S RENEWED MOTION FOR JUDGMENT OF ACQUITTAL AND/OR DISMISSAL OF AMENDED INDICTMENT

(Filed Sep. 11, 1990)

Comes now the State of Hawaii, by and through its Deputy Attorney General, John C. Bryant, Jr., and hereby moves this Honorable Court to grant further hearing on Defendant's Renewed Motion for Judgment of Acquittal and/or Dismissal of Amended Indictment, due to the discovery on Monday, September 10, 1990, of additional evidence inculpating the Defendant in the murder of Paul Warford.

This Motion is brought pursuant to Rules 12 and 47, *Hawaii Rules of Penal Procedure*, the records and files in this case, the attached Affidavit of John C. Bryant, Jr., and whatever evidence or arguments that may be adduced at a hearing on this matter.

DATED: Honolulu, Hawaii, September 11, 1990.

/s/ John C. Bryant, Jr.
JOHN C. BRYANT, JR.
Deputy Attorney General
State of Hawaii

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

STATE OF HAWAII vs. JOHN KALANI LINCOLN, Defendant.	)	CR. NO. 90-1022 AFFIDAVIT OF JOHN C. BRYANT, JR.

AFFIDAVIT OF JOHN C. BRYANT, JR.

STATE OF HAWAII CITY AND COUNTY OF HONOLULU	) SS.	

JOHN C. BRYANT, JR., being first duly sworn upon oath, hereby deposes and says:

1. That he is the Deputy Attorney General assigned to prosecute this case, he is familiar with the facts and circumstances of the case, he is licensed and competent to practice in this Court, and he makes the representations contained in this Affidavit based upon personal knowledge;

2. That on Monday, September 10, 1990, Affiant received a phone call from a Margaret Tartt;

3. That based upon his conversation with Margaret Tartt, Affiant had George Kruse, Chief Investigator for the Department of the Attorney General, speak with Margaret Tartt;

4. That a true and accurate copy of the transcript of Chief Investigator Kruse's conversation with Margaret Tartt, is attached as Exhibit "A";

5. That Margaret Tartt indicated, among other things that Lincoln confessed his involvement in the murder of Paul Warford, stating to Margaret Tartt he, Lincoln, hired Kekona to kill Paul Warford so Warford's wife could collect the insurance money;

6. That this conversation between Lincoln and Margaret Tartt took place in Leavenworth, Kansas, in early August, 1990;

7. That the reason Margaret Tartt is coming forward at this time is because of threats she has received from Lincoln and others;

8. That Lincoln also indicated a scheme was afoot to pay, or take care of, Kekona to ensure his silence;

9. That Ms. Tartt is currently under round the clock protective custody by the Department of Attorney General;

10. That to broadcast her picture on television or publish her photograph in the newspaper may endanger her life; and

11. That, therefore, the State of Hawaii requests that the extended coverage be confined to audio recordings only, and not visual.

Further Affiant sayeth naught.

/s/ John C. Bryant, Jr.
JOHN C. BRYANT, JR.

Subscribed and sworn to before me
this 11th day of September, 1990.

/s/ Madelyn L. Derby
Notary Public, State of Hawaii
My commission expires: 10/30/93

[MATERIAL DELETED IN PRINTING]